UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FIRSTLINE TRANSPORTATION SECURITY, INC.,	)	
Employer	)	
and	)	CASE No. 17-RC-12354
INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA),	)	
Petitioner	)	

BRIEF OF AMICUS CURIAE, THE HONORABLE DICK ARMEY

I. INTRODUCTION

On June 30, 2005, the Board granted the Employer's Request for Review on the ground that it raised substantial questions of first impression including "whether the Board has statutory jurisdiction over privately employed airport security screeners and, if so, whether the Board should exercise that jurisdiction." By order dated July 7, 2005, the Board invited the parties and interested amici to file briefs on or before August 4, 2005 addressing the issues posed. *This brief is submitted by former House Majority Leader* Dick Armey in support of the position that the Board does not have jurisdiction over privately employed airport screeners and, to the extent jurisdiction exists, the Board should decline to exercise such jurisdiction.

II. INTEREST OF AMICUS CURIAE

Dick Armey is currently the Co-Chairman of Freedom Works, a Washington DC - based organization dedicated to greater economic freedom for all

Americans. Mr. Armey served in the U.S. House of Representatives for 18 years. In 1995 Mr. Armey became the Majority Leader of the House.

In his capacity as House Majority Leader, Mr. Armey provided direct oversight and leadership for Congress' multi-faceted legislative response to the September 11, 2001 terrorist attacks on our nation. He personally introduced the legislation which created the Department of Homeland Security (DHS), and as the second highest ranking member of the House leadership team, he also provided overall supervision and instruction to the various committees with direct jurisdiction over different aspects of the post - September 11 response.

His supervisory responsibilities and authority included, but were not limited to, providing oversight to the House Transportation and Infrastructure Committee's Aviation Subcommittee, which held jurisdiction over matters regarding civil aviation including, among others, the issue of aviation safety and security. Thus, Mr. Armey was integrally involved in the creation and introduction of the Aviation and Transportation Security Act (ATSA), which established the Transportation Security Administration (TSA) and the Federal Security Screening Program it administers.

Because of his critical personal involvement in the legislation that underlies the issues now before the Board and his abiding interest in ensuring that the will of Congress, as expressed in ATSA, is ca rried out, former Majority Leader Armey brings an informed perspective to these issues that the parties themselves may not possess. Former Majority Leader Armey knowledge and interests are not with either party, but are based solely on the federal legislation regarding aviation security and the intent of United States Congress with respect to that legislation.

III. STATEMENT OF FACTS REGARDING CONGRESSIONAL INTENT

A. H.R. 3150, the Secure Transportation for America Act of 2001

H.R. 3150, then referred to as the Secure Transportation for America Act of 2001, was introduced in the House of Representatives on October, 2001. That bill eventually passed the House as the Airport Security Federalization Act of 2001. As passed by the House, H.R. 3150 directed the TSA to assume full and complete responsibility for airport security screening.

The bill did not specify that the screening functions had to be carried out by Federal Government employees (H.R. 3150, 107th Congress, section 102). Rather, it directed the TSA to "deputize, for enforcement of such Federal laws as the Under Secretary determines appropriate, all airport screening personnel as Federal transportation security agents and...ensure that such agents operate under common standards and common uniform, insignia, and badges." (H.R. 3150, 107th Congress, section 102) It also required that uniformed Federal personnel of the TSA supervise all screening of passengers and property at airports "...who shall have the power to order the dismissal of any individual performing such screening." (H.R. 3150, 107th Congress, section 102).

B. S. 1447, the Aviation Security Act

A companion Senate bill, S. 1447, known then as the Aviation Security Act, passed the Senate on October 11, 2001. S. 1447 directed that the security screening function had to be carried out by Federal employees under the supervision of the U.S. Attorney General (S. 1447, 107th Congress, section 108). Like H.R. 3150, S. 1447

prohibited individuals employed as security screeners from participating in a strike or asserting the right to strike. (S. 1447, 107th Congress, section 109).

In October, 2001, S. 1447 was sent to the House. The most significant difference between H.R. 3150 and S. 1447 was that S. 1447 provided that all airport security screening duties were to be performed by federal airport screeners, while H.R. only required security screeners be deputized and supervised by the TSA. The House struck all language in S. 1447 that required screeners be federal employees and inserted in lieu thereof the provisions of H.R. 3150, which permitted under certain circumstances screeners to be employed by private contractors.

C. Conference Committee

In November, 2001, the Speaker appointed conferees for consideration of the Senate bill and the House amendment. In Conference Committee on S. 1447, the conference committee members were tasked with the responsibility of reconciling the two underlying bills. The Conference Committee agreed that the airport screening function should be the responsibility of the Federal Government. Still, one major issue the conferees had to address was who should actually carry out the airport screening functions. The Senate continued to insist that airport security screeners should be Federal employees. The House, on the other hand, required screeners be employed under Federal employee supervision. However, the foundation of a program to qualify and utilize non-Federal screeners was in place in the Senate bill (S. 1447, 107th Congress, section 108).

The Conference Committee began negotiations immediately under the direction of the Chair of the House Transportation and Infrastructure Committee. The Conference Committee reached a compromise that included the employment of privately employed

security screeners who would work under the direction and control of the TSA. Former Leader Armey was instrumental in orchestrating this compromise, and in doing so, communicated the intent that the private screeners be considered the same as TSA employed screeners for the purposes of collective bargaining. On November 19, 2001, the President signed into law the Aviation and Transportation Security Act (ATSA, P.L. 107-71).

D. The Intent Of Congress Upon the Passing of ATSA

Pursuant to ATSA, the Federal Government would immediately take over responsibility for the airport security screening function. ATSA also created the Transportation Security Administration (TSA) to "be responsible for security in all modes of transportation..." (49 U.S.C. 114(d)). With regard to aviation security, the TSA was directed to "*provide for the screening* of all passengers and property...that will be carried aboard a passenger aircraft..." (49 U.S.C. 44901(a)) (emphasis supplied). For the first two years after enactment, screening at airports was to be carried out by Federal employees (49 U.S.C. 44901(a)). As agreed to as part of the afore-mentioned compromise, the TSA also established two Federal screening public-private partnership programs, the security screening pilot program (PP5) and the security screening opt-out program (Screening Partnership Program or SPP) (49 U.S.C. 44901(a); see also 44919 and 44920). The PP5 and SPP programs specifically allowed for qualified private screening companies, under contract with the TSA and with strong Federal oversight, to carry out security screening functions at airports that choose to participate in the programs. As stated in the Conference Report:

> Two years after certification airports can opt out of the Federalization of the screener level of the Federal workforce if

> the Secretary determines that these facilities would continue to provide an equal or higher level of security. Companies will be barred from providing screening if they violate federal standards, are found to allow repeated failures of the system, or prove to be a security risk. The DOT will also establish a Pilot Program for 5 airports, one from each category type, to apply for the use of private contract screeners.

(Conference Report 107-296, p. 64).

The provision allowing for the PP5 and SPP private contractor screening programs was critical to the compromise resulting in the passage of ATSA. It was the intent of Congress that the PP5 and SPP programs, and screeners employed pursuant to those programs, to be considered one and the same with the TSA screeners for all conditions of employment. All members of Congress viewed airport security as an essential national security function. All screeners, both those employed by the TSA and those employed under the PP5 or SPP programs were seen as a critical component to furthering the interest of national security. The Conference Report noted:

> The conferees recognize that the safety and security of the civil air transportation system is critical to the security of the United States and its national defense, and that a safe and secure United States civil air transportation system is essential to the basic freedom of America to move in intrastate, interstate and international transportation.... The Conferees expect that security functions at United States airports should become a Federal government responsibility....

(Conference Report 107-296, p. 53).

Congressional intent was to ensure that all security screeners, whether Federal employees or employees of private contractors participating in a Federal security program, were to be treated as one and the same with respect to policies, procedures and working conditions. In fact, Congress specifically required similar treatment and

standards in order to ensure that critical national security responsibilities were not compromised.

The TSA's personnel authority evidences such intent over both public and private screeners. Specifically, the head of the TSA was given the authority to "make such modifications to the personnel management system...as considered appropriate..." (49 U.S.C. 114(n)). Congress recognized that such flexibility was essential to TSA's critical national security role. As the conferees stated:

> The Conferees recognize that, in order to ensure that Federal screeners are able to provide the best security possible, the Secretary must be given wide latitude to determine the terms of employment of screeners.

(Conference Report 107-296, p. 64).

By using the term "Federal screeners," the Conferees differentiated between the pre-9/11 aviation security model under which air carriers were responsible for screening passengers and the post-9/11 screening model under which this function became the responsibility of the Federal Government. In fact, the Conferees noted:

> ...the terrorist hijacking and crashes of passenger aircraft on September 11, 2001, which converted civil aircraft into guided bombs for strikes against the United States, required a fundamental change in the way it approaches the task of ensuring the safety and security of the civil air transportation system.

(Conference Report 107-296, p. 53).

As contemplated by ATSA, the PP5 and SPP programs are Federal security programs provided by qualified private screening companies under contract with the TSA. Further, private screeners act as agents of the TSA and are subject to the same conditions of employment as Federal security screeners. It was the intent of Congress that

all airport security screeners are subject to the same rules and Standard Operating Procedures (SOP's), without respect to public versus private employment status.

IV. ARGUMENT

In creating the TSA and the PP5 and SPP programs, Congress intended the standards for privately employed security screeners to be the same as their publicly employed counterparts. Privately employed screeners must be employed by a qualified private screening company approved by and under contract with the TSA. Private screeners are overseen by Federal Security Directors, just like Federal screeners. Private screeners have the same employment requirements applicable to Federal Government personnel. Private screeners must receive compensation and other benefits that are not less than the level of compensation and other benefits provided to Federal Government personnel. Under the SPP, private screening companies must establish that their employees will provide the level of screening services and protection equal to or greater than the level that would be provided at the airport by Federal Government personnel.

On January 8, 2003 an Order by former TSA head Admiral J. M. Loy stated:

> Individuals carrying out the security screening function under section 44901 of Title 49, United States Code, in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization.

On its face, the use of the term "individuals" in this determination clearly refers to all screeners, whether they are employed directly by the Federal Government, or are working under a contract to the Federal Government. Congress did not differentiate between the two in ATSA. To so conclude would be an accurate reflection of the

Congressional intent on the issue of private and public screeners being treated as one and the same.

If privately employed screeners were permitted to engage in collective bargaining, such action would be wholly inconsistent with the intent of Congress and the intended design of ATSA. Further, the inconsistent application of law on this issue could jeopardize national security.

In drafting and passing ATSA, Congress clearly concluded that airport security is a *critical national security function* that must be the responsibility of the Federal Government, not air carriers. All security screeners, without regard to their employment status, serve in the same capacity on homeland security issues and the war on terrorism. Congress intended that *all screeners* be subject to the same high security standards. Admiral Loy, the former head of the TSA stated on January 9, 2003 that collective bargaining was incompatible with air transportation security:

> Fighting terrorism demands a flexible workforce that can rapidly respond to threats....That can mean changes in work assignments and other conditions of employment that are not compatible with the duty to bargain with labor unions.

The roles of the Federal security screener and the privately employed security screener are no different. Congress intended that all screeners be treated similarly with respect to the inability to strike and with respect to labor relations. Therefore, the incompatibility of collective bargaining with the flexibility required to wage the war on terrorism is no different for Federal screeners than it is for privately-employed screeners. Screeners employed in either capacity fulfill the same critical national security function. To determine otherwise would be adverse to the will of Congress.

The TSA definitively expressed its conclusion that all screeners "in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization." As such, the Board lacks jurisdiction over the screeners involved in this case. The identity of their employer is immaterial. Assertion by the Board of jurisdiction in this case would necessarily result in material differentiation among screeners based solely on the identity of their employer and would clearly thwart the intent of Congress.

V. CONCLUSION

For the reasons set forth above, the Board should decline to assert jurisdiction over airport screeners regardless of their employer.

Respectfully submitted, this 2nd day of August, 2005.

The Honorable Dick Armey

Former Majority Leader
United States House of Representatives
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Curiae brief was served this day via Federal Express as follows:

D. Michael McConnell
Regional Director, Region 17
NLRB
8600 Farley Street, Suite 100
Overland Park, KS 66212-4677

Mark L. Heinen
Gregory, Moore, Jeakle, Heinen & Brooks, P.C.
65 Cadillac Square, Suite 3727
Detroit, MI 48226-2993

William G. Trumpeter
Miller & Martin PLLC
Suite 1000 Volunteer Building
832 Georgia Avenue
Chattanooga, TN 37402-2289

This, 3rd day of August, 2005

The Honorable